FOR ARGUMENT

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In the

Supreme Court of the United States

October Term, 1977

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY,

Petitioners,

vs.

LINDA KAY SPARKMAN and LEO SPARKMAN,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Respondents agree with Petitioners' Brief with respect to Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved. In Respondents' view, however, Petitioners have seriously misdescribed the Question Presented by this case, and they have failed to include significant facts in their Statement of the Case.

In Respondents' view the real question presented and the correct Statement of the Case are as follows:

QUESTION PRESENTED

Whether the act of a state court judge in secretly approving a petition for permanent sterilization of a 15-year-old girl constitutes a judicial act within the meaning of the judicial immunity doctrine where the approval concededly was given by the judge in the clear absence of:

[1] A judicial proceeding pending or contemplated;
[2] The filing of papers in the judge's court before or after the approval;
[3] The appointment of a guardian *ad litem* to represent the interests of the minor child;
[4] Notice to the minor child or a guardian *ad litem* on her behalf;
[5] A hearing to determine the adequacy of the petition for sterilization;
[6] The preservation of the right of appeal to correct any due process error or to prevent the operation of permanent sterilization from being performed.

STATEMENT OF THE CASE

On July 9, 1971, Ora McFarlin sought court approval to have her 15-year-old daughter, Linda Spitler (now Sparkman) permanently sterilized. Warren G. Sunday, an attorney, had prepared a "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement," which contained an affidavit by Ora McFarlin that Linda was "somewhat retarded" even though she attended public schools and had been "passed along with other children in her age level." The mother also asserted that Linda had left home on "several occasions" and had "stayed overnight" with "older youth or young men." Claiming that she could not

"maintain and control a continuous observation of the activities of said daughter each and every day," the mother requested permanent sterilization in order to "prevent unfortunate circumstances." App. A25.

The petition was presented to and signed by Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana. Both the presentation and approval took place on July 9, 1971, the same day that it was signed by Ora McFarlin. Judge Stump's approval of the petition was done in an ex parte manner in an undisclosed location; no claim has ever been made, however, that the signing took place in the courthouse, the courtroom or the judge's chambers. There was no appointment of a guardian *ad litem* to represent Linda's interests. The petition was not filed with the DeKalb Circuit Court. No notice was given to Linda or anyone on her behalf of the petition, which was approved without any hearing. No court record of the secret approval was made, and there was no opportunity, therefore, for Linda or anyone on her behalf to appeal the decision to have her permanently sterilized before the act took place, seven days later on July 16, 1971. App. A11-A13.

For the convenience of this Court, a copy of the "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement" is reproduced here in its actual form but reduced from the original legal size pages. As part of the record of this case, it is also found in the printed Appendix at pages A25, A26.

STATE OF INDIANA)
COUNTY OF DEKALB) SS:

PETITION TO HAVE TUBAL LIGATION PERFORMED ON MINOR
AND INDEMNITY AGREEMENT

Ora Spitler McFarlin, being duly sworn upon her oath states that she is the [redacted] mother of and has custody of her daughter, Linda Spitler, age fifteen (15) being born January 24, 1956 and said daughter resides with her at 108 Iwo Street, Auburn, DeKalb County, Indiana.

Affiant states that her daughter's mentality is such that she is considered to be somewhat retarded although she is attending or has attended the public schools in DeKalb Central School System and has been passed along with other children in her age level even though she does not have what is considered normal mental capabilities and intelligence. Further, that said affiant has had problems in the home of said child as a result of said daughter leaving the home on several occasions to associate with older youth or young men and as a matter of fact having stayed overnight with said youth or men and about which incidents said affiant did not become aware of until after such incidents occurred. As a result of this behavior and the mental capabilities of said daughter, affiant believes that it is to the best interest of said child that a Tubal Ligation be performed on said minor daughter to prevent unfortunate circumstances to occur and since it is impossible for the affiant as mother of said minor child to maintain and control a continuous observation of the activities of said daughter each and every day.

Said affiant does hereby in consideration of the Court of the DeKalb Circuit Court approving the Tubal Ligation being performed

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ATTORNEY
INSURANCE BUILDING
AUBURN, INDIANA 46706

upon her minor daughter does hereby covenant and agree to indemnify and keep indemnified and hold Dr. John Hines, Auburn, Indiana, who said affiant is requesting perform said operation and the DeKalb Memorial Hospital, Auburn, Indiana, whereat said operation will be performed, harmless from and against all or any matters or causes of action that could or might arise as a result of the performing of said Tubal Ligation.

IN WITNESS WHEREOF, said affiant, Ora Spitler McFarlin, has hereunto subscribed her name this 9th day of July, 1971.

Ora Spitler McFarlin, Petitioner

Subscribed and sworn to before me this 9th day of July, 1971.

Warren G. Sunday, Notary Public

My commission expires January 4, 1975

I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

Harold D. Stump
Judge, DeKalb Circuit Court

Dated: July 9, 1971

WARREN G. SUNDAY
ATTORNEY
INSURANCE BUILDING
AUBURN, INDIANA 46706

On July 16, 1971, a tubal ligation was performed by John H. Hines, M.D., at the DeKalb Memorial Hospital in Auburn, Indiana, resulting in the permanent sterilization of Linda. Linda had been told that the purpose of her hospitalization was to have her appendix removed and she was unaware of the fact that a tubal ligation was performed on her. App. A11.

When on August 18, 1973, Linda married Leo Sparkman, she was still unaware of the fact that she had been permanently sterilized. A few months thereafter Linda was told by her mother that her tubes had been tied, but that they would come untied on their own accord. Linda told Leo that her tubes might have been tied at the time her appendix was removed. Around February, 1974, they went to see Dr. Hines, who falsely told them that Linda had not been sterilized. It was not until May, 1975, that Linda and Leo were for the first time informed that a tubal ligation had been performed on Linda on July 16, 1971, permanently sterilizing her. App. A12.

Linda and Leo Sparkman brought an action seeking damages under Title 42 U.S.C. §§1983 and 1985(3), contending that the actions of the Defendants in sterilizing Linda or causing her to be sterilized violated her Constitutional rights. Linda Sparkman attached pendent state claims for assault and battery and medical malpractice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood.

The United States District Court for the Northern District of Indiana, Fort Wayne Division, granted Defendants' motion to dismiss the federal claims, holding that the actions of Judge Stump presented the only state action necessary to provide federal court jurisdiction; and that since the actions of Judge Stump were clothed with absolute judicial immunity, neither he nor his alleged co-conspirators were liable under Title 42 U.S.C. §§1983 and 1985(3). Plaintiffs' remaining claims were dismissed as they were pendent to the federal causes of action.

An appeal was taken and on March 23, 1977, the Seventh Circuit Court of Appeals, with Judge Luther M. Swygert speaking for a unanimous Court, reversed the decision of the District Court and ordered the case remanded for further consistent proceedings.

In their Statement of the Case (Brief p. 7), Petitioners state that Linda was "unable to progress further than a third-grade scholastic level at school" and was "unable to respond effectively to efforts at vocational training." These statements have never heretofore appeared in the record of this case, and they are given without appendix or record citation by Petitioners. Additionally, they conflict directly with the petition which was presented to Judge Stump for his approval. In the petition it was stated that Linda was proceeding normally through school. Actually, at age 15 she was well beyond the third grade.

Also, in their Statement of the Case (Brief p. 7), Petitioners for the first time maintain that the tubal ligation performed on Linda was "reversible."[1] Nothing in the record warrants that assertion.

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[1] Although the record of this case contains no evidence regarding the possibility of reversal of the tubal ligation (because the issue has never arisen and reversibility has never been suggested by Petitioners) medical experts generally agree that reversibility depends upon the procedure used in the performance of the tubal ligation—and it is always a long-shot gamble. Dr. John Hines performed the tubal ligation and he has publicly stated that it is questionable that any reversal would be possible in Linda's case. Oster, *Sterilized daughter seeks justice,* Chi. Sun-Times, Oct. 30, 1977, p.8, col. 3.

SUMMARY OF ARGUMENT

The common law doctrine of judicial immunity established by this Court in *Randall v. Brigham*, 7 Wall. (74 U.S.) 523 (1868), *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872), and *Pierson v. Ray*, 386 U.S. 547 (1967), provides immunity to a judge for judicial acts not taken in the clear absence of jurisdiction. The predicate of this doctrine assumes that a judge is performing a *judicial act*. If the predicate is not met, the acts of a judge are not entitled to immunity. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974).

The rationale for the doctrine of judicial immunity applies only where judicial acts are performed. Although it is a judge's "duty to decide all cases within his jurisdiction that are brought before him" (*Pierson* at 554), the rationale justifying immunity for an erroneous decision is drawn from the initial requirement that there be a "case" and that therefore an error in the case "may be corrected on appeal."

Likewise, this Court in *Pierson* (at 554) realized that a judge must be free from "fear that unsatisfied litigants may hound him with litigation charging malice or corruption." This rationale is clearly based upon the requirement that the dissatisfaction is that of a "litigant" and not a non-party to a non-judicial proceeding.

Finally, in *Pierson* (at 554), this Court reasoned that a failure to grant immunity for a judicial act within a court's jurisdiction would "contribute not to principled and fearless decision-making but to intimidation." Once again, the "fearless decision-making" manner in which a judge must be free to act clearly contemplates only decision-making within the context of a judicial proceeding. No other logical analysis could exist.

Imposition of liability for non-judicial acts provides the only available remedy for the permanent deprivation of personal rights. Therefore, the threshold question presented in this case is whether the act of Judge Stump in secretly approving the permanent sterilization of Linda Sparkman was a judicial act within the contemplation of the doctrine of immunity. If not, he is not entitled to immunity, and it then becomes unnecessary to determine if his act was performed in clear absence of any jurisdiction.

Petitioners' brief (p. 28) agrees that judicial immunity does not attach "where the judge's act was not a judicial function." Indeed, their brief even concedes that when Judge Stump signed the approval of the sterilization, he did so in the total absence of each element necessary to constitute a judicial act. According to their brief (p. 31), Judge Stump's act of approval was a judicial nullity undertaken in such a manner as to fail "to implement fundamental procedures of notice, appointment of guardian *ad litem* and [the] holding [of] a formal hearing." Petitioners have correctly perceived that the total absence of notice, the total failure to appoint a guardian *ad litem* for Linda, and the total failure to provide for a hearing constitute something other than the procedure followed when a court makes a judicial order. An act undertaken in such a setting obviously is not a judicial act, but rather is an informal approval made outside of any judicial proceeding. As Petitioners' brief concludes (p. 31), the act of Judge Stump in approving Linda's sterilization "could not have been the basis of an appeal." Likewise, it could not have been a judicial act.

Although Petitioners maintain in their brief that Judge Stump's approval of the sterilization of Linda Sparkman was a judicial act (p. 30), they describe in detail why in reality the act was not a judicial act and was therefore a

judicial nullity. Petitioners do not explain why the approval was a "judicial act," other than to imply that the judge of a court of general jurisdiction, even without sitting on the bench or contemplating a case brought before him, is by virtue of his office performing a judicial act in everything he does.

However, the doctrine of judicial immunity does *not* apply to every act of an individual holding the title of "judge," *Gregory v. Thompson, supra*; *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970), even where the actions of the judge might take place in the courtroom or chambers. *Joyce v. Hickey*, 337 Mass. 118, 147 N.E.2d 187, 190 (1958); *Ex parte Virginia*, 100 U.S. 339, 348 (1879).

Although the doctrine of immunity serves to protect our judiciary, it is also intended to protect the public. *Pierson v. Ray*, 386 U.S. at 554. If Judge Stump were to be granted immunity in this case, the result would be that the judiciary would now have immunity for even non-judicial acts; and it would further mean that the interests of the public in a judiciary free from intimidation would be gravely overshadowed by the reasonable public fear of unbridled power exerted in a non-judicial setting and manner.

ARGUMENT

I

A JUDGE IS IMMUNE FROM CIVIL LIABILITY ONLY AS TO THOSE JUDICIAL ACTS PERFORMED IN EXERCISE OF HIS JURISDICTION.

The decision in this case must turn upon the common law doctrine of judicial immunity. Was Judge Stump performing a judicial act within the scope of his jurisdiction when he signed the typewritten paper thrust before him,

thereby approving the permanent sterilization of Linda Sparkman?

As summarized by this Court in *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967), "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872)." And the *Bradley* decision did indeed make clear, 13 Wall. at 351-352, that

> . . . judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

An even earlier decision by this Court, *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 536 (1868), also made plain the nature of the immunity doctrine, stating that judges of superior or general authority "are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction."

But the absolute immunity enjoyed by the judiciary does not depend, as Petitioners would have it, solely upon an examination and determination of the question whether a judge was acting in "excess of jurisdiction" or in "the clear absence of all jurisdiction over the subject matter." Underlying the whole question of whether the judge was acting within or without the area of jurisdiction is the predicate problem whether the questioned act of the judge was in fact a judicial act. When this Court has spoken of immunity for acts within the jurisdiction of a judge, it has declared that the doctrine insulates judges from civil liability only "for acts committed within their *judicial* jurisdiction," or "for acts within [their] *judicial* role," *Pierson v. Ray*, 386 U.S. at 554 (emphasis added). In the seminal decision in *Bradley v. Fisher*, 13 Wall. at 351, 354, the Court repeatedly referred to an exemption of judges from civil liability "for their *judicial acts*" within the arguable scope of their jurisdiction. And *see Imbler v. Pachtman*, 424 U.S. 409, 418, 423, n. 20 (1976).

In other words, the first inquiry must be whether the questioned act of the judge can be fairly described as a judicial act or a non-judicial act. Only if the judge appears to have been acting as a judge–rather than as an individual–does it become critical to determine whether his judicial act was performed in "the clear absence of jurisdiction over the subject matter." Obviously, questions as to jurisdiction over the subject matter cannot arise if

the perpetrator of the act in question is a layman, or a judge acting in a non-judicial capacity.

In all of the three judicial immunity cases that have been before this Court–*Randall*, *Bradley* and *Pierson*[2]–the Judges below were unquestionably acting in their judicial roles when their actions were taken. In *Randall* and *Bradley*, the Judges were performing the judicial task of disciplining lawyers who had participated in proceedings before the respective courts; and in *Pierson*, the Judge had engaged in the purely judicial task of trying certain defendants who had been duly charged with certain misdemeanors. And in each of those cases this Court had no difficulty in finding that the Judges were immune to civil liability, their judicial acts not having been performed "in the clear absence of jurisdiction over the subject matter." But the presently relevant point is that in none of those cases did this Court have occasion to examine or refine the acknowledged and essential predicate to the judicial immunity doctrine, *i.e.*, the commission of acts of a judicial nature. The opinions in those cases merely noted the necessity of judicial acts having been performed, and then concentrated on the ultimate factor in the judicial immunity equation–whether the judicial acts were committed merely in excess of jurisdiction or whether they reflected a complete absence of jurisdiction.

At the same time, the *Randall-Bradley-Pierson* trilogy indicates that virtually all of the justification and purpose

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[2]*See also Yaselli v. Goff*, 275 U.S. 503 (1927), where this Court affirmed per curiam, "on the authority of *Bradley v. Fisher*, 13 Wall. 335, 337; *Alzua v. Johnson*, 231 U.S. 106, 111," a Second Circuit decision (12 F.2d 396 (C.C.A. 2, 1926)), that had held a justice of the peace and certain federal officers immune from suit.

of the judicial immunity doctrine lies in the need to protect judges in the execution of their judicial actions. In *Pierson*, 386 U.S. at 554, for example, the Court offered three separable reasons for imposing absolute immunity on the judiciary, each reason stemming from the desirability of immunizing judicial acts as distinguished from non-judicial acts:

[1] It was said in *Pierson* that, it being the judge's "duty to decide all cases within his jurisdiction that are brought before him," any "errors may be corrected on appeal." Thus a party need not sue the judicial officer to vindicate rights that can more simply be vindicated wtihin the appellate judicial structure. But that rationale for judicial immunity necessarily assumes that the judge has acted in a judicial manner in "cases within his jurisdiction that are brought before him," so that his errors may be corrected on appeal. If he has not acted in a judicial context, however, he has done nothing that the judicial system can correct. Hence, this immunity rationale is directed solely at the performance of judicial acts, correctable if need be by an appeal in cases "brought before him."

[2] The *Pierson* opinion also indicated that, since the judge's judicial acts are correctable on appeal, "he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." Here again, the threat of suits against judges instituted by "unsatisfied litigants" assumes that the litigants have been dissatisfied by the judges' *judicial* actions taken in judicial proceedings brought before them. Such a threat obviously cannot ensue from any non-judicial personal action taken by a judge; an unsatisfied litigant by definition is a litigant who is dissatisfied by a judge's ruling in the context of some judicial-type adversary proceeding.[3]

[3] *Pierson* also said that imposing civil liability on judges "would contribute not to principled and fearless decision-making but to intimidation." Decision-making, of course, is of the very essence of judicial action. But decision-making in the context of non-judicial action, be it principled or fearless, is simply not the kind of decision-making that the judicial immunity doctrine is meant to preserve.

In sum, then, the immunity doctrine is directed only at the untrammeled exercise of judicial power. As the Court reiterated in *Pierson*, 386 U.S. at 554, the doctrine is for the benefit not of the corrupt judge but of the public, "whose interests it is that the judges should be at liberty to exercise their [judicial] functions with independence, and without fear of consequences." Thus to have absolute immunity and to justify the public interest in that immunity, as noted in Mr. Justice Douglas' dissent in *Pierson*, 386 U.S. at 567, n. 6, "the judge must be performing a judicial function." *See also Ex parte Virginia*, 100 U.S. 339, 348 (1879).

It follows that where a judge acts completely outside the arena of a judicial proceeding, he is not performing a judicial function and hence is entitled to no immunity from civil liability for his tortious extra-judicial acts. And

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[3] *Black's Law Dictionary*, 4th Ed., p. 1082, defines "litigant" as "A party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones."

in determining whether he is within or without that arena, it is not decisive whether he was holding office or was in the courtroom or in his chambers at the time of the action in question. *Joyce v. Hickey*, 337 Mass. 118, 147 N.E.2d 187, 190 (1958).[4]

What constitutes conduct falling outside the judicial arena must, in large part, be determined by examining the challenged conduct in light of the purposes and values underlying the immunity doctrine. *Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974). Is the conduct of the kind that deserves protection in order to promote the public interest in the effective and free functioning of the judicial system? See *Barr v. Matteo*, 360 U.S. 564, 572-573 (1959). Is the judge's act an inherent part of the judicial function in disposing of any and all "cases within his jurisdiction that are brought before him"? See *Pierson v. Ray*, *supra*, 554. Is the act such as to be amenable to possible correction on appeal to a higher court? *Ibid.* Is immunization of the challenged act necessary to preserve the judge's duty to engage in "principled and fearless decision-making" and to free him from fear of "intimidation" in the exercise of that judicial function? *Ibid.* Given such considerations, the Court that resolves the judicial or non-judicial nature of the judge's act must make "a discerning inquiry into whether the contributions of immunity to effective government [or to an effective judicial system] in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

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[4]"A judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess." Cooley on Torts 805-806 (3d ed. 1906).

It is precisely because the foregoing questions must all be answered in the negative, thus weighing the balance totally against immunity, that lower courts have consistently held that judges are liable for the harm caused by their physical and other acts disassociated from their judicial duties. Thus in *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), the Ninth Circuit held an Arizona Justice of the Peace liable in a §1983 action for having bodily assaulted and ejected from the courtroom a non-lawyer who had sought to represent a friend who had earlier been fined for a minor traffic offense. As the court stated, 500 F.2d at 64:

> The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. A judicial act within the meaning of the doctrine may normally be corrected on appeal. *See Pierson v. Ray*, 386 U.S. at 554. But when a judge exercises physical force in a courtroom, his decision is not amenable to appellate correction. More importantly, we cannot believe that the purpose of the judicial immunity doctrine—to promote "principled and fearless decision-making"—will suffer in the slightest if it is held that judges who physically assault persons in their courtrooms have no automatic immunity.

See also Spires v. Botteroff, 317 F.2d 273 (7th Cir. 1963), cert. denied, 379 U.S. 938 (1964) (liability imposed on a judge who, after disqualifying himself from a case,

interfered with the proceedings and filed a false affidavit therein); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970) (state judge may not be immune for acts done as chairman of an administrative body when he was not in the performance of any judicial duties); *Yates v. Hoffman Estates*, 209 F.Supp. 757 (D.C.Ill. 1962) (judge held liable under §1983 for having performed the "non-judicial action" of directing a police officer to arrest and take into custody a person not named in a warrant); *Penn v. Eubanks*, 360 F.Supp. 699 (M.D.Ala. 1973) (judge of a state jury board subject to liability for administrative acts taken in that capacity); *Ex parte Virginia*, 100 U.S. 339 (1879) (selection of jurors not a judicial act which could grant immunity).

In light of all the foregoing considerations, the point has now been reached where Judge Stump's action in approving the sterilization of Linda Kay Sparkman must be tested as being either a judicial or a non-judicial action.

II

IN THE TOTAL ABSENCE OF ANY JUDICIAL PROCEEDING HAVING BEEN INVOKED OR EVEN CONTEMPLATED, JUDGE STUMP'S SECRET APPROVAL OF THE PERMANENT STERILIZATION MUST BE DEEMED A NON-JUDICIAL ACT AS TO WHICH NO JUDICIAL IMMUNITY ATTACHES.

From every standpoint, starting with either the public interest or the judicial values implicit in the judicial immunity concept, Judge Stump's secret signing of the sterilization approval in 1971 bears none of the markings of a judicial act. Indeed, it is at once an act so unfair, so destructive of due process, so totally devoid of judicial concern for the interests and well-being of the young girl involved as to lack all pretense of qualifying as a judicial

act. Such a severe conclusion is compelled by the following considerations pertinent to the judicial immunity concepts:

[1] The petition and approval portion signed by the judge, which apparently were drafted by the attorney for Linda's mother, neither constituted nor related to the institution of any kind of judicial proceeding. The petition had no case caption naming parties or naming any court. No number was ever assigned to the matter. Indeed, no attempt was made to file or deposit these documents, or any other piece of paper, in the Clerk's Office of the Court on which Judge Stump sat. Not even Judge Stump was left with a copy of what he had signed. To this day, no proceeding of any kind, to which this sterilization approval might somehow be related, has ever been instituted before Judge Stump or the Court on which he still sits.[5]

[2] The petition was presented in some secretive manner to Judge Stump, and he signed the sterilization approval in some equally secretive manner still not revealed. No attempt was made by Judge Stump to appoint a guardian *ad litem* to protect and represent the interests of a juvenile whose mother had asserted a cruelly adverse position. Nor was any step taken by Judge Stump to ensure that Linda would be notified of the impending sterilization in time to protest so permanent a loss of her ability to procreate. Thus were lacking the two most elemental of the

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[5]The fact that no judicial proceeding of any kind was ever instituted before Judge Stump serves to distinguish this case from *Quindlen v. Hirschi*, 284 P.2d 723 (Okla. 1955), much relied upon in Petitioners' Brief, p. 22. In *Quindlen* an "insanity case" had been instituted in the state court; the only defect was the failure to notify the minor girl or to appoint a guardian *ad litem*.

procedural due process requirements—a notice and an opportunity to protest before any final action is taken.

[3] Neither the petition nor the approval even pretended to cite any Indiana statute or rule of law which authorizes such summary and ex parte procedure. Whatever jurisdiction may reside in Judge Stump or his Court to deal with juveniles in general or with sterilization in particular, not one of the Indiana statutes cited in Judge Stump's brief in this Court (pp. 4–6) contemplates or authorizes secret, ex parte proceedings where the interests of the parent and child are so widely disparate. Those statutes, moreover, do not indicate that any kind of a sterilization proceeding can be invoked, or a sterilization ordered by a court, on a mother's untutored and unproved assertions that her daughter is "somewhat retarded" and has been staying "overnight with said youth or men." App. A25.

[4] The total and intended failure to notify Linda of the petition and approval necessarily made it impossible for Linda, or any guardian or representative, to seek any sort of appellate review or correction of Judge Stump's approval of the sterilization. Since no order was ever entered on the docket sheet or records of Judge Stump's court, it seems doubtful that any appeal from such a nonexistent order could ever have been taken, even if Linda had been notified in time. Possibly some sort of extraordinary relief by way of prohibition or mandamus might have served to correct such gross due process violations; but the utter secrecy that surrounded the sterilization approval and the speed with which the approval was executed (seven days) rendered such a remedy illusory and useless.

Thus was taken from Linda what this Court described in *Bradley v. Fisher*, 13 Wall. at 354, as that most basic

"rule of natural justice"—whereby no court should ever exercise any of its powers "without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense."

[5] The above factors were all exacerbated, of course, by the permanency of the damage done to Linda's body. For all medical intents and purposes, nothing can now be done to reverse the lasting effect of the tubal ligation. And since the legal capacities to stop the operation or to preserve the status quo ceased—both theoretically and practically—the moment the hasty operation was performed, the judicial system can only stand aside and mourn one of its less finer hours.

All of these factors combine to demonstrate that Judge Stump's action on July 9, 1971, in approving the so-called tubal ligation petition was not a judicial act taken in the course of a judicial proceeding filed or to be filed in the DeKalb Circuit Court. It was an act as utterly non-judicial as would have been the act of Judge Stump in approving a petition to demolish a structure, a petition presented to him on a Friday evening in a drugstore or on the street corner in Auburn, Indiana, without any attempt ever having been made to institute any kind of real property proceeding in his Court. It is simply not part of the recognized judicial function secretly to sign ex parte orders that have no relation to any kind of a judicial proceeding pending in the court. Thus in *Joyce v. Hickey*, 337 Mass. 118, 147 N.E.2d 187, 190 (1958), a probate judge was held liable in an action for false arrest and imprisonment where the judge's contempt action occurred when there allegedly "was no session of court and no formal proceeding pending before [the judge] . . . [and when he] was not engaged in any permissible judicial inquiry with respect to any pro-

bate matter, or the conduct of fiduciaries or attorneys, or other subject as to which [he] could properly act as a judge."[6]

Indeed, Judge Stump's brief (p. 28) in this Court properly concedes that judicial immunity does not attach "where the judge's act was not a judicial function." And that brief also concedes (p. 31), though rather perversely, that Judge Stump's act of approving the tubal ligation petition "required nothing of anybody and carried with it no power of sanction should it have been ignored . . . [and] required no giving of notice and could not have been the basis of an appeal." The brief adds (p. 31) that "great weight and considerable compassion" may be attached to Judge Stump's act precisely because it was such a judicial nullity, combined with an acknowledged failure on the judge's part "to implement fundamental procedures of notice, appointment of guardian *ad litem* and holding a formal hearing." In short, Judge Stump in effect has proudly proclaimed to this Court that his action on July 9, 1971, "was not a judicial function." Any action of a judge that requires nothing of anybody, carries with it no power of sanction if ignored, requires no giving of notice, and cannot be made the basis of an appeal (all done outside the context of any judicial proceeding and without any jurisdiction having been invoked) is a perfect and classic example of a

[6]*See also Stewart v. Cooley*, 23 Minn. 347, 350 (1877), allowing a conspiracy action to lie against a judge where the conspiracy allegedly began before the commencement of any judicial proceeding, the judge's conduct not having been "in the course of any judicial proceeding or in the discharge of any judicial function." *See also* Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 273 (1937).

non-judicial act. Obviously, immunity was not designed to attach to that extra-judicial kind of action.[7]

Judge Stump's characterizations of his own action are well taken, for they demonstrate not only the non-judicial nature of that action but also the reasons why the judicial immunity doctrine is totally inapplicable. To pit Judge Stump's characterizations against the immunity rationalizations as summarized in *Pierson*, 386 U.S. at 554, produces the following conclusions:

[1] The immunity doctrine is not here appropriate since there is no way, according to Judge Stump, in which any errors in his July 9, 1971, action could have been corrected on appeal. That action, he says (Brief, p. 31), was not an "order" that could have been "the basis of an appeal." How, then, can any errors be corrected if immunity is imposed? *See Pierson*, 386 U.S. at 554.

[2] If, as Judge Stump says, the action of July 9, 1971, "required nothing of anybody," and carried with it no sanction or basis of an appeal, how can Judge Stump "fear that unsatisfied litigants may hound him with litigation charging malice and corruption" (*Pierson*, 386 U.S. at 554) if he is subjected to liability in this instance? How can there be any "litigants" to fear if there has never been an adversary judicial proceeding between "litigants"?

[3] How can it be said that lifting immunity from Judge Stump's action of July 9, 1971, "would contribute not to principled and fearless decision-making but to intimidation" (*Pierson*, 386 U.S. at 554)? Can so gross a violation of

[7]For a discussion of the instant case, *see* Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 Vand. L. Rev. 941, 960-963 (1977).

due process guarantees, in the form of a non-appealable non-order, be fairly described as a "principled and fearless decision-making" event? Why should the immunity doctrine be applied merely to perpetuate the judicial freedom to impose such odious non-orders on what a judge conceives to be the "best interests" (Brief, p. 31) of some unsuspecting child or adult? On the contrary, if by subjecting Judge Stump to liability in this instance will intimidate and frighten him and other judges of general jurisdiction from committing such blatant and uncorrectible non-judicial violations of due process, the public interest will have been well served.[8]

Judge Stump's characterizations of his own action on July 9, 1971, hardly comport with his suggestion (Brief, p. 31) that judges, "by their judicial pronouncements, perpetrate an aura of deism which surrounds the bench." Judge Stump's action was simply not a "judicial pronouncement." At best, in the words of the Seventh Circuit (Pet. App. A14), it was

> ... an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process. Here a juvenile was ordered sterilized without the taking of the slightest steps to ensure that her rights were protected. Not only was the plaintiff not given representation, she was not even told what was happening to her. She was afforded no opportunity to contest the validity of her mother's

[8]See Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322 (1969). See also *Developments in the Law, Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 833 (1957).

> allegations or to have a higher court examine whether the substance of those allegations, even if true, warranted her sterilization. Finally, the petition and order were never filed in court. This kind of purported justice does not fall within the categories of cases at law or in equity.

In a word, Judge Stump's action was that of a layman, not a judge acting within the four corners of a judicial proceeding in which some kind of jurisdiction has been invoked. The doctrine of absolute judicial immunity was never intended to protect judges from liability when they act so far outside "the aura of deism which surrounds the bench."

CONCLUSION

For these various reasons, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

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